No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

Whether Section 302(c)(5) of the Labor Management Relations Act, 1947 requires the transfer of assets (without a transfer of liabilities) from a multiemployer benefit plan to a new multiemployer benefit plan established by the same union and certain employers who left the original plan?

Whether Section 302(c)(5) requires such a transfer in circumstances where the transfer would violate the plan's governing trust instruments and/or provisions of the Employee Retirement Income Security Act of 1974, as amended?

LIST OF PARTIES

All of the Appellees in the proceedings below are Petitioners before this Court. In addition to Local 144 Nursing Home Pension Fund, Petitioners include New York City Nursing Home—Local 144 Welfare Fund, and Peter Ottley John Kelley, Austin Cedeno, Frank McKinney, Bartholomew J. Lawson, Fred Wilkens, William McCarthy and Marsha McLendon, as Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund.

All of the Appellants in the proceedings below are Respondents before this Court. In addition to Nicholas Demisay, Respondents include Ernest Dicker, Jack Friedman and Abraham Grossman as Trustees of the Local 144—Southern New York Residential Health Care Facilities Association Pension Fund and Welfare Fund, Joseph Unger, as executor for the estate of Moses Unger, individually and d/b/a American Nursing Home, Abraham Grossman, individually and d/b/a Bruckner Nursing Home, Lyden Nursing Home and Williamsbridge Manor Nursing Home, B.N.H. Management Associates, Inc., Ernest Dicker, individually and d/b/a Clearview Nursing Home, Seacrest Nursing Home and Shoreview Nursing Home, Nicholas Demisay, individually and d/b/a Clove Lakes Nursing Home, Desdemona Jones Caruso, individually and d/b/a Fieldston Lodge Nursing Home, Jack Friedman, individually and d/b/a Fort Tryon Nursing Home, Franklin Nursing Home, and Friedwald House HRF. Wald Management Associates, Inc., 801 190th Street Management Associates, Inc., and 127-47 Franklin Avenue Management Associates, Inc. Respondents also include Edward Wizner, Martha Mulligan, Elizabeth Metcalf, Ivy Waite, Curlene McIntosh, Anelia Trout, Seena Moreno, Michael Heimur, Pamela Woods, Andrew Lenza, Mary Dibrienza, Euloeia Reyes, Marlene Louis, Mary Mozzolo, Fred Gerillo, Donna Jacobsen, Elsa Rivilla, Helen Leavy, Connie Caruselle, Yvonne Fernicola, David

Pabon, Cynthia Lee, Anita Harris and Mary Lindsay, as participants in the Petitioner funds and Respondent funds and as employees of the various Respondent nursing homes.

The Petitioners have a motion pending before this Court that Frank Russo, Jerome Ottley, Justin Hyppolite, Wiener Volney, William Pascocello and Thomas Haas be substituted in the place and stead of Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Fred Wilkens, William McCarthy and Marsha McLendon, who were Appellees in the proceedings below in their capacity as Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund and were succeeded in May, 1992 by the persons named above.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 935 F.2d 528, and is set forth in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the United States District Court for the Southern District of New York is reported at 710 F. Supp. 58, and is set forth in Pet. App. at 13a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 12, 1991. Pet. App. at 1a. On August 21, 1991, Justice Marshall issued

an order extending the time for filing this petition for certiorari to and including October 10, 1991. The petition for a writ of certiorari was filed on October 10, 1991. By order entered June 22, 1992, the petition for a writ of certiorari was granted. By letter dated July 16, 1992, the Clerk of this Court extended the time for filing a brief on the merits to and including August 26, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001-1461, and Section 302(c)(5) of the Labor Management Relations Act 1947 ("Section 302(c)(5)" or "LMRA"), 29 U.S.C. § 186(c)(5). Pertinent portions of these laws are set forth in Pet. App. at 32a-55a.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioners the New York City Nursing Home—Local 144 Welfare Fund ("Greater Welfare Fund") and the Local 144 Nursing Home Pension Fund ("Greater Pension Fund") (collectively the "Greater Funds") are multiemployer benefit funds. Until 1981, the Respondent employers, who are members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern Employers"), belonged to the Greater New York Health Care Facilities Association, Inc. ("Greater New York Employer Association"), a multiemployer bargaining association. Joint Appendix ("J.A.") at 7, 132. As members of the Greater New York Employer Association, the Respondent employers were obligated pursuant to collective bargaining agreements between the Greater New York Employer Association and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees

Union, Service Employees International Union, AFL-CIO ("Local 144") to contribute to the Greater Funds on behalf of their employees. J.A. at 7, 133.

In 1981, the Southern Employers withdrew from the Greater New York Employer Association and negotiated individual contracts with Local 144 pursuant to which the Southern Employers continued contributing to the Greater Funds on behalf of their employees. J.A. at 7, 133. On June 30, 1984, the Southern Employers withdrew from the Greater Funds. After a strike, the Southern Employers and Local 144 signed collective bargaining agreements providing for the establishment of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds"). J.A. at 29-30.

During the 1984 collective bargaining negotiations with the Southern Employers, Local 144 resisted their withdrawal from the Greater Funds and the establishment of the Southern Funds; the Union warned the Southern Employers that they would have sole financial responsibility for assuring that employees received benefits under the new funds. J.A. at 207-09. Ultimately, Local 144 obtained contractual commitments from each Southern Employer that their employees would lose nothing as a result of the establishment of the Southern Funds. J.A. at 209-10. The collective bargaining agreements between the Southern Employers and Local 144 did not provide for the transfer of any assets or liabilities from the Greater Funds to the Southern Funds, nor were the Greater Funds parties to those agreements. J.A. at 17-48.

Pursuant to a requirement in the 1984 collective bargaining agreements, the Southern Pension Fund trustees voted on November 5, 1985, to grant credited service (earned under the Greater Pension Fund) to their par-

ticipants who had less than 10 years of service and therefore had not yet vested.[1]

The benefit plans involved in this case provide benefits to employees in the nursing home industry, a low wage sector of our economy. Like other health benefit plans, the Greater Welfare Fund has been struggling to maintain health benefit levels in the face of ever-rising costs. The Greater Pension Fund provides a modest maximum pension of $350 per month. J.A. at 205. This case does not raise issues regarding excess assets in benefit plans.

The Greater Funds retain all the liabilities they had to the employees of the Southern Employers who had been plan participants. In other words, the Greater Funds have paid, and continue to pay, all benefits to which their participants are entitled, including benefits to which employees of the Southern Employers are entitled. J.A. at 309.

B. The Proceedings Below

The Respondents initiated this action against Petitioners in the United States District Court for the Southern District of New York on August 7, 1985. J.A. at 3-4. The Respondents contended that the Greater Funds' failure to transfer a portion of the plan assets to the Southern Funds constituted a "structural defect" in violation of Section 302(c)(5).[2] The Respondents also contended that

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[1] J.A. at 29, 135-36. The employees of the Southern Employers did not accrue benefits in any pension plan between July 1, 1984, and November 30, 1985, because the Southern Pension Fund did not become operational until December 1, 1985. J.A. at 12, 130-31. The Southern Employers continued to contribute to the Greater Welfare Fund until September 30, 1985, and that Fund provided welfare benefits for the Southern employees until December 1, 1985, the date that the Southern Welfare Fund became operational. J.A. at 11-12, 129, 131.

[2] Specifically, the Respondents claimed that:

> [I]n order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are

the trustees of the Greater Funds breached their fiduciary duties under ERISA Section 404(a), 29 U.S.C. § 1104(a), by not transferring a portion of the Greater Funds' assets to the Southern Funds. The Respondents further contended that the Greater Funds violated ERISA Section 4234, 29 U.S.C. § 1414, because the governing plan documents did not contain provisions requiring an asset transfer. Respondents and Petitioners both filed motions for summary judgment on the above claims. Petitioners also filed a motion to dismiss for lack of standing and jurisdiction.

On March 15, 1989, the District Court denied Respondents' summary judgment motion, granted Petitioners' motion for summary judgment on the first two claims, and dismissed the third claim for lack of standing. The District Court concluded that "any transfer here would be for the primary benefit of employers, not the employees" and that in enacting ERISA and Section 302 Congress did not intend to benefit employers. Pet. App. at 20a-21a. Further, the District Court, referring to ERISA, concluded that "[b]ecause Congress has specifically legislated in this area and has decided when a transfer of assets and liabilities is mandated, the Court should not and cannot expansively interpret LMRA Section 302(c)(5) so as to accomplish that result." Pet. App. at 26a. Finally, the District Court held that the

attributable, in corresponding amounts, to the *contributions made by each contributing employer*. Further, *the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer* . . . . Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made.

Response (to Interrogatory No. 6) of Respondents/Plaintiffs to Petitioners'/Defendants' First Set of Interrogatories (emphasis added). Respondents made the same assertion regarding the Greater Welfare Fund. J.A. at 305-07.

asset transfer provisions in ERISA Sections 4234 and 4235, 29 U.S.C. §§ 1414 and 1415, were inapplicable because there had been no transfer of liabilities and the employees had not changed their bargaining representative. Pet. App. at 26a-28a.

Respondents appealed to the Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit reversed the judgment of the District Court on the first claim, holding that:

> the only way that the Southern Employees could ever receive the "sole and exclusive benefit" of their employers' contributions to the Greater Funds on their behalf would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds. Absent such a reallocation, the Greater Funds would suffer from a "structural defect."

Pet. App. at 11a. The Second Circuit remanded with instructions to enter partial summary judgment for Respondents and to determine the amount of plan assets to be transferred to the Southern Funds. The Second Circuit found it unnecessary to reach the merits of the remaining two claims.[3]

SUMMARY OF ARGUMENT

The Second Circuit erred in holding that the Labor Management Relations Act, 1947 Section 302(c)(5) governs the transfer of assets of employee benefit plans. In the present case, as in *United Mine Workers v. Robinson*, 455 U.S. 562, 573 (1982), "[t]he Court of Appeals did not attempt to ground its holding on the text or legislative history of § 302(c)(5)." Indeed, the language and legislative history of Section 302(c)(5) demon-

[3] The other two claims of the Respondents were (1) that ERISA Section 4235, 29 U.S.C. § 1415, requires that the Greater Funds adopt new asset transfer rules, and (2) that the Greater Funds' trustees allegedly "had breached their fiduciary duties under § 404 of ERISA." Pet. App. at 4a-5a. The District Court found no merit in these claims. Pet. App. at 26a-28a.

strate that this provision was intended by the Congress to be a narrow exception to a broad criminal prohibition. Section 302(c)(5) was never intended to, and does not, authorize the federal courts to rewrite and regulate employee benefit plans; in particular, it contains no reference to the transfer of plan assets. Moreover, the Second Circuit's decision squarely conflicts with this Court's decision in *Robinson*.

By contrast with Section 302(c)(5), the Employee Retirement Income Security Act of 1974, as amended, is comprehensive legislation regulating employee benefit plans. ERISA expressly deals with the transfer of assets of benefit plans. Not only is a transfer of assets not required by ERISA in this case, but such a transfer would in fact violate ERISA.

ARGUMENT

I. SECTION 302(c)(5) DOES NOT AUTHORIZE FEDERAL COURTS TO ORDER A TRANSFER OF ASSETS FROM ONE MULTIEMPLOYER BENEFIT PLAN TO ANOTHER

A. Congress Limited the Requirements of Section 302(c)(5) to Those Specified in That Section

Section 302(c)(5), 29 U.S.C. § 186(c)(5), should not be read to regulate conduct not expressly prohibited by its terms. Section 302(c)(5) is an exception to a criminal statute which was enacted in 1947 and "was aimed at practices that Congress considered inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 425 (1959). Section 302(a), 29 U.S.C. § 186(a), prohibits an employer from making any payment to any employee representative, and Section 302(b), 29 U.S.C. § 186(b), prohibits the receipt of any payment made in violation of Section 302(a). The federal courts are also authorized under Section 302(e), 29 U.S.C. § 186(e), to restrain violations of these criminal prohibitions.

Section 302(c)(5) carves out from the broad prohibition on employer contributions payments to:

> a trust fund established . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents).

29 U.S.C. § 186(c)(5). In order to avoid criminal penalties, such a trust fund must comply with certain standards set forth with excruciating specificity in Section 302(c)(5). A jointly-administered trust fund must: (1) use employer contributions only for specified types of benefits; (2) use those assets only for benefits for employees and families of the contributing employer and the employees and families of other contributing employers; (3) set forth the detailed basis for the contributions in a written agreement with the employer; (4) hold its assets in trust; (5) provide that employers and employees be equally represented in the administration of the plan; (6) provide for an annual audit; and (7) keep pension and annuities contributions in a separate trust from contributions for other benefits. *Id.* Thus, the language of the statute provides no basis for the conclusion that Congress intended the statute to create a general set of rules governing employee benefit plans. Rather, the words of the statute require strict compliance with its specific requirements, and nothing more.

Moreover, the legislative history of Section 302(c)(5) provides no support for the proposition that Congress intended to confer on the federal courts authority to oversee the administration of employee benefit plans or to review the reasonableness of plan terms. Indeed, the legislative history of that Section makes no mention of a multiemployer plan's statutory duty to transfer plan assets to another multiemployer plan, under the circumstances of the present case—or any other circumstances,

for that matter.[4] Rather, the legislative history confirms that Congress' concern was based on the perception of a "grave danger that the funds [would] be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they [were] established, and that they will in fact become rackets." 93 Cong. Rec. 4805 (1947) (statement of Sen. Ball). The "specific purpose" of Section 302(c)(5) was "to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions." 93 Cong. Rec. 4805 (1947) (statement of Sen. Byrd).

The specific provisions of Section 302(c)(5) were designed as a means to prevent these abuses. Congress enacted Section 302 against a backdrop of reported corruption through bribery of employee representatives. Congress feared that union officials might divert funds contributed by employers for welfare purposes to carry out entirely different union objectives. Such a view was reflected by this Court in *Arroyo*, 359 U.S. at 425-26, where the Court emphasized that the purpose of this section was to address union and employer corruption:

> Those members of Congress who supported [§ 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be fi-

[4] The absence of any mention of an asserted statutory duty has been noted by this Court as significant in the interpretation of a statute. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548, 551 (1988) ("it [is] highly unlikely that the limited reach of the statute is the consequence of inadvertence rather than deliberate choice").

> nanced by employers' contributions and administered exclusively by union officials.

Id.; *see also United Mine Workers v. Robinson*, 455 U.S. at 570 n.8 (citing *Arroyo*). In view of its status as a part of a criminal statute, Section 302(c)(5) should be strictly construed to insure compliance with the specific safeguards that Congress wrote into it. *See Dowling v. United States*, 473 U.S. 207, 214 (1985); *Sutherland Stat. Const.* § 59.03 (4th Ed.).

Moreover, as this Court concluded in *Arroyo*, "[a]n examination of the legislative history confirms that a literal construction of this statute does no violence to common sense." 359 U.S. at 424. This Court observed that the debates in Congress show "not the slightest indication that § 302 was intended to duplicate state criminal laws." 359 U.S. at 425. Likewise, those debates show "not the slightest indication that § 302 was intended to duplicate state" trust laws. *Id.*

Strong support for the conclusion that Section 302(c)(5) does not establish federal fiduciary standards for trustees of employee benefit plans is provided by the statutory language, an absence of any evidence of such a congressional purpose in the legislative history, and the fact that the provision is a part of a criminal statute. Section 302(c)(5) was not crafted to be the fount from which a broad new federal regulatory code of conduct for plan trustees would flow. Rather, "Congress clearly intended to draw upon established principles of state trust law as a means of regulating employer-employee payments." [5]

In sum, an important purpose for the subsequent enactment of ERISA was to close a perceived gap in the federal regulation of employee benefit plans. "The Labor

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[5] *Bricklayers, Masons & Plasterers Int'l Union of Am. v. Stuart Plastering Co.*, 512 F.2d 1017, 1025 (5th Cir. 1975); *see also Central States v. Central Transport, Inc.*, 472 U.S. 559, 571 n.10 (1985).

Management Relations Act, Section 302, . . . is not intended to establish, nor does it provide standards for . . . fiduciary conduct."[6] Thus, Congress designed the LMRA to provide only very limited rules for the operation of jointly-administered benefit plans.

B. Lower Federal Courts Have Misconstrued Section 302(c)(5) in Asserting Broad Jurisdiction over the Regulation of Employee Benefit Plans

1. *Vacillation Among Lower Courts Concerning the Scope of Section 302(c)(5)*

As perceived abuses arose over the years in jointly-administered plans and in the absence of a federal statute designed to regulate benefit plans, some federal courts yielded to the temptation to stretch the boundaries of Section 302(c)(5) to engraft federal standards for plans. One result has been that federal courts have vacillated between applying the specific requirements in Section 302(c)(5) as written by Congress and asserting that Section as a source of broad judicial authority to regulate employee benefit plans. For example, in *Copra v. Suro*, 236 F.2d 107, 115 (1st Cir. 1956), the First Circuit, in dicta, said that Section 302's "legislative history suggests . . . that Congress intended in § 302(e) to create a broad equity jurisdiction that would authorize the district courts . . . to exercise a more general equity power over the welfare funds whose life in effect depends on the permissive exception of § 302(c)(5)." Thereafter, the First Circuit recanted that erroneous interpretation in *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968). In *Bowers*, the Court held that LMRA "limits federal courts to 'restrain violations' . . . of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of

[6] S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973); *see also* H. Rep. No. 533, 93d Cong., 1st Sess. 4 (1973). *See infra* pp. 20-21.

the trust fund." 393 F.2d at 424. Significantly, the structural violations that the First Circuit found to be within the federal courts' authority involved the failure to meet the *specific* requirements of Section 302(c)(5). *Bowers*, 393 F.2d at 424 n.4.

The Second Circuit has similarly vacillated in its handling of Section 302(c)(5) cases. For example, in *Riley v. MEBA Pension Trust*, 570 F.2d 406, 412 (2d Cir. 1977), the Second Circuit acknowledged that it did not have "enthusiasm for the notion that § 302(c)(5) gave the federal courts a roving jurisdiction over even the structure of pension plans." Yet in *Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196 (2d Cir. 1980), the same court held that it had jurisdiction where the plaintiff alleged that a particular trust provision was arbitrary or unreasonable; such allegations "sufficiently allege a 'structural defect' to support federal juridiction."[7] In *Local 50, Bakery & Confectionery Workers Union v. Local 3, Bakery & Confectionery Workers Union*, 733 F.2d 229 (2d Cir. 1984), the Second Circuit held that Section 302(c)(5) required a transfer of assets from one multiemployer benefit plan to another.[8]

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[7] *Valle*, 623 F.2d at 203 n.15. The Third Circuit has also vacillated in its treatment of these cases. *Compare Moyer v. Kirkpatrick*, 387 F.2d 955 (3d Cir. 1968), *aff'g* 265 F. Supp. 348 (E.D. Pa. 1967) (court refused to examine a change in eligibility requirements because it ruled there was no legal basis for interference) *with Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978) (court determined it had jurisdiction to examine eligibility rule which was arbitrary and capricious because the rule constitutes a structural defect).

[8] The Second Circuit's (and other Circuits') expansive interpretation of Section 302(c)(5) (especially since the decision in *Local 50*) is encouraging litigation. The progeny includes *Sheet Metal Workers' Local 28 v. Gallagher*, 960 F.2d 1196 (3d Cir. 1992); *Trapani v. Consolidated Edison Employees' Mut. Aid Soc'y, Inc.*, 891 F.2d 48 (2d Cir. 1989); *Caterino v. Barry*, 761 F. Supp. 897 (D. Mass.), *appeal docketed*, No. 91-1542 (1st Cir. June 12, 1991) (argued April 8, 1992); *Plasterers Local 202 v. Plasterers Local*

2. *The Early Section 302(c)(5) Cases*

Some of the confusion in applying Section 302(c)(5) is traceable to the early cases arising in the federal courts in the District of Columbia ("District"). Prior to the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) ("Court Reform Act"), the federal courts in the District had jurisdiction over local matters in addition to the normal judicial responsibilities of other federal courts.[9] Accordingly, when an employee benefit plan trust was before a federal court in the District, the court could, and did, apply the general equity powers of courts over the operation of trusts. In those cases, the District's federal courts applied the arbitrary and capricious standard of review to employee benefit plan trusts, just as those courts applied that standard to other trusts (i.e., non-benefit trusts).[10] In a number of cases involving employee benefit plans, the courts did not even cite Section 302(c)(5).[11] In other cases, the courts cited Section 302(c)(5), but only as the reason the benefit plan was in trust form,

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60, 710 F. Supp. 42 (E.D.N.Y.), *appeal dismissed without opinion*, 888 F.2d 1376 (2d Cir. 1989).

The *Trapani* case is of special interest because the benefit plan involved was a single employer benefit plan, demonstrating that the vulnerability of benefit plans to judicial rewriting of plan terms is not limited to multiemployer plans. Although the *Trapani* Court cited ERISA as authority, it did not cite any ERISA legislative history or any ERISA caselaw. The only cases discussed and relied upon by the *Trapani* Court were Section 302(c)(5) cases.

[9] D.C. Code Ann. § 11-521 (1967); *see also Palmore v. United States*, 411 U.S. 389, 392 n.2 (1973) (prior to passage of Court Reform Act, the United States District Court "was filling the role of both a local and federal court").

[10] *See infra* notes 11 & 13.

[11] *See, e.g., Gaydosh v. Lewis*, 410 F.2d 262 (D.C. Cir. 1969); *Sturgill v. Lewis*, 372 F.2d 400 (D.C. Cir. 1966); *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962).

not as the source of the applicable trust law.[12] Even after the federal courts in the District no longer had "local" jurisdiction following the passage of the Court Reform Act, they continued to handle Section 302(c)(5) cases in the same manner as they had before, applying traditional principles under local trust law.[13]

A review of Section 302(c)(5) cases attests that federal courts in other circuits often adopted the trust law analysis from the District cases. They did so without noting the unusual role of federal courts in the District in exercising local jurisdiction prior to the Court Reform Act.[14] Non-District cases which are based on analyses from District cases are themselves cited in support of the proposition that federal courts can examine the activities of Section 302(c)(5) plan trustees on an arbitrary and capricious basis.[15]

Eventually, many federal courts justified broad jurisdiction over the regulation of employee benefit plans under a "structural defect" analysis. This analysis seems to have

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[12] *See, e.g.*, *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968); *Miniard v. Lewis*, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968); *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964).

[13] *See, e.g.*, *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079 (D.C. Cir. 1986); *Pete v. United Mine Workers*, 517 F.2d 1275 (D.C. Cir. 1975); *Lowenstern v. International Ass'n of Machinists & Aerospace Workers*, 479 F.2d 1211 (D.C. Cir. 1973); *Assalone v. Carey*, 473 F.2d 199 (D.C. Cir. 1972).

[14] *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1971); *see also Seafarers Pension Plan v. Sturgis*, 630 F.2d 218 (4th Cir. 1980); *Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969); *Lugo v. Employees Retirement Fund of Illumination Prods. Indus.*, 529 F.2d 251 (2d Cir. 1973), *aff'g* 366 F. Supp. 99 (E.D.N.Y.), *cert. denied*, 429 U.S. 826 (1976); *Insley v. Joyce*, 330 F. Supp. 1228 (N.D. Ill. 1971).

[15] *See, e.g.*, *Sellers v. O'Connell*, 701 F.2d 575 (6th Cir. 1983); *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Johnson v. Botica*, 537 F.2d 930 (7th Cir. 1976).

been derived from combining the type of traditional trust analysis used by the District's federal courts under their authority to apply local law with the analysis used by the First Circuit in *Bowers*. The irony is that the First Circuit in *Bowers* narrowly construed structural violations to be the specific requirements stated in Section 302 (c) (5).[16] The Second Circuit has cited *Bowers* with approval, and professed to adopt this "narrow view" of the scope of Section 302. *Lugo*, 529 F.2d 251. Nevertheless, the Second Circuit asserted that under the "structural defect" analysis, a plan's procedural provisions may be so arbitrary and capricious that they could violate the "sole and exclusive benefit" provision of Section 302(c)(5). *Lugo*, 529 F.2d at 255-56.[17] Other federal courts have similarly interpreted the "sole and exclusive benefit requirement as requiring reasonable plan terms and procedures.[18]

Thus, instead of construing the words of the statute when noncompliance with Section 302(c)(5) is alleged,

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[16] *See supra* pp. 11-12.

[17] Although the *Lugo* court did not cite to any cases for this holding, it affirmed the lower court ruling on this matter and that ruling was primarily based on District or other derivative cases. *See Lugo*, 366 F. Supp. 99.

[18] *See, e.g.*, *Sellers*, 701 F.2d 575; *Knauss*, 583 F.2d 82; *Reiherzer*, 581 F.2d 1266; *Johnson*, 537 F.2d 930; *Lee*, 453 F.2d 1309.

Other Section 302(c)(5) cases contain reasoning that is equally problematic. For example, in *Nedd v. United Mine Workers of Am.*, 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the Third Circuit held that Section 302(c)(5) established a federal common law cause of action for breach of fiduciary duties. *Nedd*, 556 F.2d at 203. According to the Third Circuit," [t]he very enactment of § 302(c)(5) shows that Congress was not satisfied to leave protection of these bargained-for benefits entirely to the state law of trusts." *Id.* at 205. Not surprisingly, the *Nedd* court cites no support for these propositions. *Cf. infra* pp. 20-21.

those courts muse as to whether there is a "structural defect" in the plan. This becomes a search akin to the explorers search for the fountain of youth.

3. *Differences Among Courts of Appeals in Interpreting Section 302(c)(5)*

The term "structural defect" defies definition and legal analysis. As recently as April, 1992, the Third Circuit examined "the extant jurisprudence of structural defect" and found it to be "still somewhat elusive." *Gallagher*, 960 F.2d at 1209. That Court noted that "recognizing structural defects in specific cases has proven difficult, and courts in this circuit and elsewhere have engaged in a tedious case-by-case analysis, producing what sometimes appear to be conflicting results." *Id.* at 1210.

In additon to conflicting results, conflicting reasoning is evident when the Second Circuit's decision in this case is compared with *Gallagher*, *Stinson v. Ironworkers Dist. Council*, 869 F.2d 1014 (7th Cir. 1989), and *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992). In *Gallagher*, the Third Circuit held "that employees have no right to carry funds attributable to them with them when they depart a fund for reasons unrelated to the exercise of collective bargaining rights." *Gallagher*, 960 F.2d at 1215. In contrast, the Second Circuit here ordered a transfer of assets even though the departures from the Petitioner Funds were "for reasons unrelated to the exercise of collective bargaining rights." In fact, Local 144 continues to represent the participants in the Southern Funds as well as the participants in the Greater Funds.

In *Stinson*, a case addressing issues similar to those involved here, the Seventh Circuit found no structural

defect where a multiemployer plan contained a provision prohibiting a proportional allocation of the plan's reserves upon withdrawal from the plan. The Seventh Circuit held that "Section 302(c)(5) 'does not require that an employee, employer, group of employers, or union be given a proportionate share of a trust fund's assets simply because a decision is reached to cease participation in the trust.'" *Stinson*, 869 F.2d at 1018 (quoting with approval from the district court's opinion). In *Phillips*, the Ninth Circuit found that there was no structural defect in a multiemployer plan, even though the plan's rules excluded over 97% of the plan's former participants from receiving any benefits.[19] *Phillips*, 944 F.2d at 519.

It is not surprising that the jurisprudence that has evolved is confusing and conflicting since the statutory language of Section 302(c)(5) provides no policy guidance for the "structural defect" theory. The absence of such guidance is understandable because the legislative history shows that the "structural defect" theory was not within Congress' intended scope of that legislation. Further, this Court has repeatedly emphasized the limited scope of that section. *See Arroyo*, 359 U.S. at 425-26; *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981);

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[19] Incredibly, the *Phillips* Court asserted in dicta that even if a pension benefit plan complies with ERISA's minimum vesting period, the federal courts have the power to rewrite the terms of a benefit plan to require the plan to adopt a "shorter period." 944 F.2d at 514. More astounding is the Court's assertion that such power exists under "both ERISA and the LMRA." *Id. Cf. infra* note 20.

Similarly, in *Mahoney v. Board of Trustees*, 1992 WL 197471 (1st Cir. Aug. 18, 1992), the First Circuit has asserted that the "setting of pension benefit levels" by trustees of a plan is subject to federal court review, under both LMRA and ERISA, as to whether the benefit levels are arbitrary or capricious. However, the establishment or amendment of a plan's design (i.e. terms) is a settlor function, not a fiduciary function, and therefore should not be reviewable under fiduciary standards. *See infra* authorities at note 54.

Robinson, 455 U.S. at 570-75. As a result, the federal courts simply do not have the power, by reason of Section 302(c)(5), to restructure[20] and regulate employee benefit plans.

C. The Decision Below Is Inconsistent with Decisions of This Court Under Section 302(c)(5)

This Court has not construed Section 302(c)(5) to authorize federal courts to regulate transfers of assets among multiemployer benefit plans.[21] To the contrary, this Court has interpreted and applied Section 302(c)(5) in accord with the words of the statute and its status as an exception to a criminal prohibition. This approach is reflected by the Court in *Arroyo*, where the Court noted "*specific* standards were established" to assure that plan expenditures would be made only for approved purposes. *Arroyo*, 359 U.S. at 426 (emphasis added).

Twenty-three years later, this Court held that the reasonableness of collectively bargained plan provisions were not open to scrutiny under Section 302(c)(5). *Robinson*, 455 U.S. at 570-71. According to the *Robinson* Court, the plain meaning of Section 302(c)(5) "is

[20] There is no evidence in the statutory language or legislative history of either Section 302(c)(5) of LMRA or of ERISA that Congress intended to authorize the federal courts to modify or reform the terms of a plan. Even under traditional trust law, courts generally did not, and do not, have the power to change the terms of a trust. Restatement (Second) of Trusts, Ch. 10 (Termination and Modification of the Trust); G. G. Bogert & G. T. Bogert, *The Law of Trusts & Trustees* § 561 (Court Control-Alteration of Powers-Deviation) and § 994 (Power of Court to Modify Trust) (rev. 2d ed. 1980).

[21] This Court explicitly left open whether federal courts are authorized by Section 302(c)(5) to enforce fiduciary duties on plan trustees. *Robinson*, 455 U.S. at 573 n.12. The Ninth Circuit Court of Appeals recently acknowledged that this Court "has yet to address the issue directly" as to whether federal courts have power under Section 302(c)(5) to restructure or rewrite the terms of benefit plans. *Phillips*, 944 F.2d at 513.

simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5)." *Id.* at 570.

There is no equivocation or tentativeness in this Court's discussion of this issue. It is clear from *Robinson* that the federal courts have no authority to entertain Respondents' claims because a collectively bargained term of an employee benefit plan is not subject to federal court review for reasonableness under Section 302 of LMRA.

The facts that were determinative in *Robinson* are also present in the instant case. The collective bargaining agreements here (to which Respondent Employers were parties) are clear that the terms of the trust agreements are incorporated by reference.[22] The trust agreements incorporated into those collective bargaining agreements explicitly prohibit the forced payments Respondents seek.[23]

[22] The collective bargaining agreement provides:

> "The parties understand that the New York City Nursing House-Local 144 Welfare Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust executed in connection with the said Fund."

J.A. at 218. The agreement also provides:

> The payments so made by the Employer shall be used by New York City Nursing Home-Local 144 Welfare Fund solely for those fringe benefits set forth in the Trust Agreement heretofore executed and thereafter amended establishing such New York City Nursing-Local 144 Welfare Fund.

J.A. at 218. The agreement provides virtually identical language regarding the Greater Pension Fund. J.A. at 220-21.

[23] The trust agreement provides:

> "The assets of the Fund and of the Plan shall at no time inure to the benefit of any Employer."
>
> * * *
>
> No employer or employee, or any person claiming by or through such employee by reason of having been named a beneficiary, in a certificate or otherwise, shall have any rights,

In *Central Tool Co. v. International Ass'n of Machinists Nat'l Pension Fund*, 811 F.2d 651 (D.C. Cir. 1987), as in the present case, the collective bargaining agreement incorporated by reference the plan's trust agreement. The D.C. Circuit held that the provision in the trust agreement "falls within the ambit of *Robinson* and outside our proper authority to review." *Central Tool*, 811 F.2d at 664. Thus, Petitioners' refusal to disburse plan assets as sought by Respondents falls squarely within the *Robinson* category of decisions compelled by collective bargaining agreement. Under the trust agreements, the trustees have no option regarding Respondents' demands. In the present case, the collective bargaining agreement incorporated by reference the trust agreement which prohibits the transfer of assets sought by Respondents. Accordingly, the asset transfer prohibition in the trust agreement "falls within the ambit of *Robinson* and outside [the federal courts'] authority to review." *Central Tool*, 811 F.2d at 664.

D. In ERISA, Congress Created a Comprehensive Body of Federal Law Applicable to Employee Benefit Plans

Congress struggled with the complexities of employee benefit plans for more than seven years before enacting ERISA in 1974, the first comprehensive federal legislation regulating private employee benefit plans. As this Court noted in *Nachman v. PBGC*, 446 U.S. 359, 361-62 (1980), ERISA is a "comprehensive and reticulated" statutory framework for the regulation of employee ben-

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> title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that employees shall have the right to such benefits as may specifically be provided by the Plan.

The trust agreements of both Petitioner Pension Fund and Welfare Fund contain this language. J.A. at 161-62; *see also* J.A. at 185-86.

efit plans.[24] Unlike LMRA, ERISA was specifically intended to provide strict fiduciary standards for employee benefit plans.[25] Congress recognized that the LMRA had not created such standards:

> The Labor-Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish, nor does it provide standards for . . . fiduciary conduct.[26]

With the enactment of ERISA, Congress federalized fiduciary law relating to employee benefit plans[27] and directed that the federal courts have exclusive jurisdiction to enforce those fiduciary rules. In *Amax Coal Co.*, this Court noted that ERISA had occupied the

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[24] *Accord Ingersoll-Rand v. McClendon*, 111 S. Ct. 478, 482 (1990) ("ERISA is a comprehensive statute"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "comprehensively regulates employee pension and welfare plans"); *Robinson*, 455 U.S. at 575 ("detailed and comprehensive standards of the ERISA"); *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 569 (1979) ("ERISA deals . . . in detail with pension plans" and is "comprehensive legislation").

[25] Congress explicitly declared that a primary policy of ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans . . . ." Section 2(b), 29 U.S.C. § 1001(b).

[26] S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973); *see also* H. Rep. No. 533, 93d Cong., 1st Sess. 4 (1973).

[27] Congress intended that a federal common law under ERISA would be fashioned by the federal judiciary. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)) ("[C]ourts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"); *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) ("ERISA's legislative history indicates that . . . 'a body of federal substantive law will be developed by the courts. . . .'").

field, stating that ERISA "essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." [28] 453 U.S. at 323.

Pertinent here is this Court's reasoning in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979). In *Daniel*, this Court held that the "existence of this comprehensive legislation [ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending" the federal securities laws to pension plans. *Daniel*, 439 U.S. at 569-70. This Court noted that:

> ERISA requires pension plans to disclose specified information to employees in a specified manner, *see* 29 U.S.C. §§ 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts . . . .

Id. at 569. The reasoning of this Court in *Daniel* applies here with equal force.[29] The generalized language in Section 302(c)(5) is in stark contrast to ERISA's comprehensive, detailed treatment of the very question involved here.

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[28] A "Section 302(c)(5) trustee," like other trustees, would have been subject to the well-developed body of state trust law. This Court did not say that the "strict fiduciary standards that a Section 302(c)(5) trustee must meet" emanated from Section 302(c)(5). It is clear from the fiduciary provisions in ERISA that Congress borrowed heavily from state trust law experience in formulating ERISA's rules. H. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973). Moreover, Congress intended that the evolving federal fiduciary common law under ERISA would borrow heavily from state trust law experience.

[29] *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) ("[s]pecific terms prevail over the general"); *see also Busic v. United States*, 446 U.S. 398, 406 (1980); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

II. SECTION 302(c)(5) DOES NOT RESTRICT THE USE OF A PARTICULAR EMPLOYER'S CONTRIBUTIONS TO THE PAYMENT OF BENEFITS FOR ONLY THAT EMPLOYER'S EMPLOYEES

A. The Specific Language of Section 302 Permits Funds to Pool All Contributions for Benefits for All Participants

The language of Section 302(c)(5) explicitly allows contributions of any contributing employer to a multiemployer benefit plan to be used for benefits of plan participants who are not employees of the particular contributing employer. Section 302(c)(5) specifically provides that contributions made by an employer are to be "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents *jointly with the employees of other employers making similar payments*, and their families and dependents)." 29 U.S.C. § 186(c)(5) (emphasis added). The meaning of this text is plain—contributions by any employer in a multiemployer plan may be applied to pay benefits to employees of other contributing employers, as well as to the employees of the particular contributing employer.[30]

Recently, the Ninth Circuit Court of Appeals had occasion to note:

> In any such pooled fund, depending on the empirically contingent pattern of employee health and sickness, one employer's employees may never need to file a claim and this employer's payments may be used wholly to pay for claims made by a different employer's employees. Because any multiemployer trust

[30] It is noteworthy that key cases in the jurisprudence regarding "structural defect" inexplicably fail to include the emphasized language when they quote the exclusive benefit provisions of Section 302(c)(5), thereby shifting the focus of attention in a misleading fashion to the employees of a single employer. *See, e.g., Gallagher*, 960 F.2d at 1209; *Local 50*, 733 F.2d at 232, 234.

> fund might result in one employer's payments covering the claims of another employer's employees, the Employers' argument leads inexorably to the conclusion that all multiemployer trust funds violate the "sole and exclusive benefit" rule of subsection 302(c)(5). This conclusion, directly contradicting subsection 302(c)(5)'s explicit authorization of multiemployer trust funds, is untenable.

British Motor Car Distribs., Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989); *see also Stinson*, 869 F.2d 1014.

Further, this Court has flatly stated that there is not "any restriction on the allocations of the funds among the persons protected by § 302(c)(5)." *Robinson*, 455 U.S. at 572. In *Robinson*, this Court declared that the "plain meaning" of Section 302(c)(5) "is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5)."[31] *Id.* at 570.

B. A Rule Requiring Segregation of Plan Assets by Contributing Employers Would Undermine the Underlying Principles of the Multiemployer Plan System

Multiemployer plans have traditionally pooled contributions. Congress understood and acknowledged that practice at the time it enacted Section 302(c)(5), and there is no evidence that Congress intended to change the prac-

[31] In *Walsh v. Schlecht*, 429 U.S. 401 (1977), this Court held that Section 302(c)(5) was not violated where, pursuant to a collective bargaining agreement, a general contractor paid contributions to multiemployer benefit plans measured by the hours of work performed by a subcontractor's employees (as well as his own employees) even though no employee of the subcontractor was entitled to benefits in the benefit plans.

tice. In the Senate debate preceding adoption of the language which became Section 302(c)(5), there are repeated references to then-existing funds which covered the employees of many employers.[32] The proponents of Section 302(c)(5) asserted that such funds could continue to operate with relatively minor changes, such as joint employer-union administration. As Senator Taft stated:

> The purpose is to prevent the abuse of welfare funds. . . . The amendment would not substantially affect any of those funds, except that with respect to some of them the appointment of an employer representative might be required, in order that there might be joint administration instead of single administration.

93 Cong. Rec. 4877 (1947) (statement of Sen. Taft).

Uncontroverted expert testimony in the record herein establishes the fact that a requirement forcing these plans to segregate funds by each particular contributing employer would undermine the viability of these plans. According to Professor Dan M. McGill of the Wharton School of Finance, University of Pennsylvania, the foremost American academic scholar on employee benefit plans, in the typical multiemployer plan,

> [t]he contributions of all employers are available to the trustees of the plan to pay benefits for all eligible employees. . . . [A]n employer shares the costs of the entire plan with all other participating employers. . . . [O]ne of the efficiencies of multiemployer plans is that they do not attempt to track costs so that they may be assigned to a particular employer. The same principle applies for individual employees. . . . The cost of the employee's welfare and pension benefits

[32] *See, e.g.*, 93 Cong. Rec. 4881-82 (1947) (statement of Sen. Morse) (International Ladies Garment Workers Union vacation fund); 93 Cong. Rec. 4805 (1947) (statement of Sen. Byrd) (United Mine Workers welfare fund); and 93 Cong. Rec. 4876 (1947) (statement of Sen. Taft) (United Mine Workers welfare fund).

could fall anywhere in a wide range, depending on age, health or other variables.[33]

Professor McGill cautions that:

> Diversion of multiemployer pension plan assets to . . . follow the employer and his employees when they leave the multiemployer plan . . . would be inconsistent with the basic concepts of mutiemployer plans. . . . In short, multiemployer plans are cost-sharing devices, and to the extent that cost-sharing is nullified by forced transfers, they will lose their viability.[34]

The pooling of resources to provide against a common risk is a well-established insurance principle and is at the heart of multiemployer pension and welfare benefit plans. A multiemployer plan allows the opportunity to spread the risk over a larger group and to benefit from economies of scale in administration. According to A. H. Higgs, Jr., Vice President of the Martin E. Segal Company, a firm serving about half of all multiemployer plan participants in the United States:

> The contribution rate for a multiemployer plan is . . . determined on a uniform basis plan-wide . . . without regard to their employer or his employees' characteristics. . . . If the contributions of a particular employer in excess of the value of health benefits provided to the employer's employees were required to be paid out of the multiemployer plan to the benefit of that employer when the employer left the plan, only employers with a positive balance would likely choose to leave the plan and take assets from it. Employers with a negative balance would stay put, continuing to incur costs greater than their contributions. This is a classic case of the impermissible practice known to insurers as adverse selection.[35]

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[33] McGill Affidavit, J.A. at 251-52.

[34] *Id.*, J.A. at 252-53.

[35] Higgs Affidavit, J.A. at 231.

By participating in a multiemployer plan the employer strikes a clear bargain: for the length of its collective bargaining commitment the employer is contractually obligated to pay the contributions stated, and in return, the plan is responsible for providing benefits to employees of the employer in accordance with the plan's provisions.[36] Most multiemployer plans standardize benefit costs for competing employers without regard to the actual cost characteristics of any single employer's work force. They stabilize actuarial and investment experience, afford the economies of large scale operations, and have the ability to provide a continuity of coverage for employees moving among different employers within the plan.[37]

Without cost-sharing, chaos would result for the thousands of multiemployer plans providing benefits for over nine million participants (and millions more of their families).[38] Many multiemployer plans include hundreds even thousands of employers and often employees obtain credits under the plan while working for a number of different employers. Typically, multiemployer plans do not keep records of benefits on an employer basis.[39] Individual accounting would be so inordinately expensive that as a practical matter, many multiemployer plans could not exist if they were forced to undertake it.[40]

More important, exposure to claims from any employer or employee who could claim an excess of contributions over costs would destroy the principle on which multiemployer plans are built. It would call into question decades of experience and create a powerful incentive for

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[36] McGill Affidavit, J.A. at 251.

[37] *Id.*, J.A. at 251-53; Higgs Affidavit, J.A. at 231-32, 234-35.

[38] Higgs Affidavit, J.A. at 228.

[39] McGill Affidavit, J.A. at 252.

[40] *Id.*

litigation [41] by employers who think they have paid (on an experience-rated basis) more in contributions than the value of benefits provided to their employees.[42] In substance, that is what Respondents seek in the present case. Multiemployer plans need not, nor should they be required to, segregate each employer's contribution for the benefit of that employer's workers.

III. ERISA SPECIFICALLY PROHIBITS THE TRANSFER OF ASSETS FROM ONE MULTIEMPLOYER PLAN TO ANOTHER UNDER THE FACTS IN THIS CASE

By requiring the Greater Funds to transfer a significant portion of its assets to the newly-established Southern Funds, the Second Circuit is requiring conduct that violates ERISA and/or its policies. Whereas Title IV of ERISA, 29 U.S.C. §§ 1301-1461, prohibits a transfer of assets without a transfer of corresponding liabilities, the Second Circuit is requiring such a transfer. Whereas Title IV of ERISA requires a withdrawing employer to pay a multiemployer pension plan withdrawal liability,[43] the Second Circuit is requiring the petitioner plans to pay money to withdrawing employers. Whereas Title I of ERISA, 29 U.S.C. §§ 1001-1168, bars the use of plan assets to benefit employers, the Second Circuit is mandating that plan assets be so used. Whereas Title I requires plan fiduciaries to administer the plan in accordance with the plan's governing documents, the Second Circuit is requiring Petitioner plans to pay out money in violation of the plan's governing documents. Accordingly, the Sec-

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[41] *See supra* note 8.

[42] *Caterino*, 761 F. Supp. 897.

[43] Under Title IV, an employer whose obligation to contribute to a multiemployer plan ceases ("withdraws") is liable to pay the plan a share of certain unfunded benefits ("withdrawal liability"). Section 4201, 29 U.S.C. § 1381.

ond Circuit's holding would require conduct that is in clear violation of ERISA.

A. ERISA Bars Multiemployer Plan Transfers Unless Certain Statutory Requirements Are Met

The transfer of assets sought in this case is impermissible because of noncompliance with ERISA's requirements pertaining to transfer of assets and liabilities. With the enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), Congress amended ERISA specifically to address issues relating to multiemployer plans that had not been adequately resolved when ERISA was enacted in 1974. The language of MPPAA is unambiguous—it prohibits transfers of assets between multiemployer pension plans unless specific requirements are satisfied. Section 4231, 29 U.S.C. § 1411.

MPPAA provides that "a plan sponsor may not cause a multiemployer plan to . . . engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such . . . transfer satisfies the requirements of subsection (b) of this section." ERISA § 4231(a), 29 U.S.C. § 1411(a). Subsection (b) requires, among other things, that, before any such transfer, notice must be provided to the Pension Benefit Guaranty Corporation ("PBGC") so that it can determine whether the transfer satisfies other statutory requirements. ERISA § 4231(b)(1), 29 U.S.C. § 1411(b)(1). Any such transfer must also comply with specified substantive restrictions in Sections 4231(b)(2)-(4), 29 U.S.C. §§ 1411(b)(2)-(4). Where, as here, none of these requirements has been satisfied, the Greater Funds cannot legally transfer their assets to the Southern Funds.

B. ERISA Does Not Permit the Transfer of Assets Without a Transfer of Corresponding Liabilities

Under MPPAA, any transfer of assets is required to be accompanied by a transfer of liabilities. This is true whether the transfer is permissive (i.e., at the volition

of the transferor plan) or mandatory (i.e., when there is a certified change of collective bargaining representative). ERISA §§ 4231, 4234 and 4235, 29 U.S.C. §§ 1411, 1414, and 1415.

In this case, the district court made a specific finding that "there has been no transfer of liabilities from the Greater Funds to the Southern Funds." Pet. App. at 24a, and the Second Circuit could not, and did not, modify this finding.[44] As the District Court correctly noted, "an assumption of liability for welfare benefits and past service credit by the Southern Funds is not the same as a transfer of liabilities from the Greater Funds to them, since the latter implies that the Greater Funds had a pre-existing obligation to those who left the plan, which is simply not the case here." Pet. App. at 24a.

Absent a transfer of liabilities, a transfer of assets from the Greater Pension Fund would be inconsistent with MPPAA and therefore could not be made legally.[45] As the District Court noted in its opinion, "there is no indication in the statute or its legislative history demonstrating that Congress intended to require a transfer of assets in any other situation unless there was a voluntary

[44] According to regulations promulgated by PBGC and the IRS, a transfer of liabilities requires the diminution of liabilities of the transferor plan and the assumption of those liabilities by the transferee plan. 29 C.F.R. § 2670.3 (1991); 26 C.F.R. § 1.414(l)-1(b)(3) (1991).

[45] In fact, not only does the congressional scheme mandate that no plan assets be transferred without a corresponding transfer of liabilities, but also, there are specified circumstances when "a transfer of assets from the old plan to the new plan is prohibited" —and even though an asset transfer is prohibited, "the old plan shall transfer" certain liabilities to the "new plan." ERISA §§ 4235(e)(1) and (2), 29 U.S.C. §§ 1415(e)(1) and (2). Thus, although congressional policy requires a transfer of assets only when accompanied by a transfer of liabilities, in certain circumstances it requires the transfer of liabilities even in the absence of a transfer of assets.

transfer of liabilities, which is clearly not the case here." [46]

Section 4235, 29 U.S.C. § 1415, is the only provision in ERISA that *requires* a transfer of assets and liabilities. Such a transfer is mandated only when there is a certified change in the employees' collective bargaining representative. Under this provision, a multiemployer plan must transfer assets as well as corresponding liabilities when an employer withdraws from the plan as a result of the decertification of a collective bargaining representative. Where, as here, there has been no change in the collective bargaining representative, since Local 144 continues to represent the employees of the Southern Employers, no transfer of assets and liabilities is required.[47]

C. ERISA Bars Plans from Transferring Assets for the Benefit of Employers

ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1), provides that "the assets of a plan shall never inure to the benefit of any employer." [48] *Amax Coal Co.*, 453 U.S. at 333. Moreover, this Court has noted that Section 406 of ERISA, 29 U.S.C. § 1106, "requires that a

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[46] Pet. App. at 28a.

[47] Absent decertification, no provisions in MPPAA require multiemployer plans to transfer assets. Section 4234, 29 U.S.C. § 1414, which Respondents have used to support their demand, in no way mandates a transfer of assets. It requires that a multiemployer plan adopt asset-transfer rules which do not unreasonably restrict the transfer of plan assets when there is a voluntary transfer of plan liabilities, and that such rules be uniform in their application. If the plan chooses not to transfer liabilities, which it is entitled to do absent decertification, the requirements in Section 4234 are simply not applicable, as in the present case.

[48] The mandate of ERISA Section 403(c)(1) has been held to bar contributing employers from obtaining the benefit of a surplus of assets upon termination of a multiemployer plan. *British Motor Car Distribs.*, 882 F.2d 371.

benefit plan prevent participant employers from gaining *even temporary use* of assets to which the plan is entitled." *Central Transport*, 472 U.S. at 573 (emphasis added). Furthermore, "§ 406(a)(1)(E) prohibits any transaction between the trust and a 'party in interest,' including an employer." *Amax Coal Co.*, 453 U.S. at 333.

A transfer of assets from the Greater Funds to the Southern Funds would constitute a transfer of assets for the benefit of the Southern Employers, thus violating ERISA Section 403(c)(1) and the Internal Revenue Code.[49] The District Court specifically found that the transfer of assets sought here would be for the benefit of the Southern Employers. Pet. App. at 20a-21a. The Southern Employers had a contractual obligation to fund the Southern Plans and thus any money paid into the Southern Funds by the Greater Funds would inure to the benefit of the Southern Employers. That concept is underscored by the fact that it is the withdrawing employers themselves, and not the new Southern Plans, that initiated this present action. Indeed, those employers conceded that their purpose in bringing this action was to diminish their obligation to contribute to the new plans.[50] Accordingly, if the Greater Funds were to pay money to the Southern Funds, that would be the payment of money to the benefit of the Southern Employers under ERISA. Such a transfer to the Southern Plans would constitute "income" to the Southern Employers under the Internal Revenue Code.[51]

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[49] Internal Revenue Code Section 401(a)(2), 26 U.S.C. § 401(a)(2), bars the use of plan assets for any purpose "other than for the exclusive benefit" of employees or their beneficiaries.

[50] Grossman Dep., J.A. at 332-33; Demisay Dep., J.A. at 341-42.

[51] The Internal Revenue Service ("IRS") has issued a ruling regarding a proposed transfer of assets from one multiemployer plan to another, which supports the proposition that the transfer sought here should be viewed as a transfer for the benefit of the Southern Employers. The IRS ruled that the "assets from Plan X,

ERISA Section 403 highlights the fact that Congress considered the circumstances under which an employer may be entitled to the return of a part of its contributions to an employee benefit plan. After careful consideration, Congress chose to limit severely those circumstances to situations where the contribution to a multiemployer plan was made by "a mistake of fact or law." ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii).[52] There is no contention in this case that there was any entitlement to the return of contributions pursuant to those provisions of ERISA, and indeed, there is no such entitlement.

D. ERISA's Strict Fiduciary Requirements Prohibit the Trustees from Transferring Assets in Violation of the Terms of the Trust Instrument

A transfer of assets in this case would also violate Section 404 of ERISA. Section 404(a)(1)(D) specifically states that a plan fiduciary must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). Thus, the trustees of the Greater Funds have an explicit duty under ERISA to adhere to the Greater Funds' trust provisions concerning the use of plan assets. The trust instruments with which the trustees must comply bar the diversion of plan assets to the benefit of an employer.[53]

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whether received by the contributing employers or transferred to Plan Y, are to be included in the gross income of the employers." IRS Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989); *see also* IRS Priv. Ltr. Rul. 91-36-017 (June 10, 1991). The IRS concluded the proposed transfer of money from one multiemployer plan to another multiemployer plan constitutes taxable income to the employers even though each of the two multiemployer plans had the same participants.

[52] The statute allows "the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake." *Id.*

[53] The Greater Funds' trust instruments provide that "the assets of the Fund and of the Plan shall at no time inure to the benefit

The trust instruments also explicitly provide that no "employee . . . shall have any rights, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that employees shall have the right to such benefits as may specifically be provided" by the Plan. J.A. at 161-62, 185. Thus, absent a claim for benefits, employees have no right to any plan assets. There is no allegation that the Greater Funds have not honored all benefit claims to which participants are entitled under the terms of the Greater Funds' governing documents and therefore, Respondent Employees have no right to plan assets.

Section 404(a)(1)(A) of ERISA requires the Greater Funds to carry out their plan duties "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A). In addition, Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), requires that plan trustees comply with strict fiduciary standards in the discharge of their duties. *See Amax Coal Co.*, 453 U.S. at 332. Trustees are therefore required to make all fiduciary decisions,[54] including re-

of any Employer." Greater Welfare Fund Trust Agreement, J.A. at 162; Greater Pension Fund Trust Agreement, J.A. at 186. They also provide that no "amendment shall permit any return or payments over any part of the then existing Trust Fund to any Employer." Greater Pension Fund Trust Agreement, J.A. at 194; Greater Welfare Fund Trust Agreement, J.A. at 171. This Court has observed that "[b]y the terms of the trust . . . , the trustees are obligated" to apply such provisions. *Robinson*, 455 U.S. at 573. This Court added "the common law of trusts does not alter this obligation." *Id.* at 574.

[54] However, the amendment of a governing plan document, for example, to allow for a transfer of assets, is *not* a fiduciary function. The establishment and amendment of the terms of a plan (in contrast to the administration of those plan terms) are settlor functions not subject to fiduciary standards. When a settlor "decides to establish, amend or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in

quests for asset transfers, by taking into consideration the welfare of the fund and the beneficiaries. A fiduciary may not disburse plan assets to individuals who proclaim some equitable justification for depleting the fund's resources. The only justification for use of plan assets is to provide benefits to participants and beneficiaries and to pay reasonable administrative expenses. There are no allegations that any Respondent is entitled to benefits under the terms of the plan. Nor can Respondents' demand for plan assets be in any way considered a reasonable administrative expense. Thus, it would be a breach of ERISA's strict fiduciary requirements for the trustees of the Greater Funds to transfer assets to the Southern Funds.

CONCLUSION

The Second Circuit decision below has fundamentally misconstrued Section 302(c)(5), and in so doing, has failed to follow this Court's relevant decisions. Section 302(c)(5) does not authorize the federal courts to regulate broadly the administration of employee benefit plans or to review the reasonableness of plan terms. Furthermore, the interpretation of Section 302(c)(5) by the Second Circuit is inconsistent with expressed purposes of ERISA[55] and would actually violate several of ERISA's

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accordance with its terms, its actions are not to be judged by fiduciary standards." *Musto v. American Can Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *see also Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 112 S. Ct. 968 (1992); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir. 1991); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *United Indep. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262, 1268 (7th Cir. 1985).

[55] In *NLRB v. Amax Coal Co.*, this Court noted that Congress has adopted as national policy the protection of the stability of multiemployer plans:

> Congress amended ERISA in 1980 to strengthen the funding requirements and enhance the financial stability of multi-

specific statutory requirements. Therefore, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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> employer pension plans. "In these amendments, Congress sought to foster the maintenance and growth of multiemployer pension plans . . . [and] to provide reasonable protection for the interests of the participants and beneficiaries of financially distressed multiemployer pension plans." §§ 3(c)(2) and (c)(3) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1209-1210. Section 3(a)(4)(A) of the 1980 Act states that "withdrawals of contributing employers from a multiemployer pension . . . adversely [affect] the plan, its participants and beneficiaries, and labor-management relations. . . ." 94 Stat. 1209. The Court of Appeals' decision therefore runs afoul of express congressional policy favoring multiemployer trusts.

453 U.S. at 339 n.22. The decision of the Second Circuit in the present case "therefore runs afoul of express congressional policy favoring multiemployer trusts." *Id.*